A

LEE CHONG JIN

v.

PP

B

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CRIMINAL APPEAL NO: 41-11-2005-II]
26 JULY 2006

C ***CRIMINAL PROCEDURE:*** *Sentence - Appeal - Appeal against sentence - Previous convictions - 'Gap' principle - Whether taken into account correctly - Public interest - Consideration of - Whether sentence reduced*

D The appellant herein appealed against the sentence imposed by the Magistrate sentencing him to a fine of RM10,000 in default six months' imprisonment on his own plea of guilt. The brief facts were that the appellant was found to be in possession of a tablet which the chemist report confirmed contained 0.31 grammes of 3,4 Methylenedioxymethamohetamine (MDMA) and was listed as a E dangerous drug in the First Schedule of the Dangerous Drugs Act 1952 ('the DDA'). The appellant appealed against the sentence primarily on the grounds that the Magistrate (1) erred in law and in principle in passing the sentence and wrongly took into account F the appellant's previous conviction in the year 1992 and that the same was irrelevant and a distinct offence; (2) misdirected herself when she failed to take into consideration the weight of the MDMA found in the possession of the appellant was a mere 0.31 grammes and (3) in the circumstances of the case, the sentence G was manifestly and grossly excessive.

Held:

(1) The magistrate had erred in law in not giving due regard to the 'gap' principle as there was a span of 12 years from the H previous conviction of the appellant which was committed in 1992 and for a completely different offence, namely, possession of offensive weapon under s. 6(1) of Corrosive & Explosives Substances & Offensives Weapon Ordinance 1958. (para 9)

I **(2)** This court agreed with the views expressed in *Zaidon Shariff v. PP* and *Soosainathan v. PP* that the weight of drugs found on a person plays a significant role in assessing sentence. Although the Magistrate had erred in stating that the

seriousness of the offence committed by the appellant 'cannot be measured simply by creating an equation between quantity of drugs and sentence to be pegged in accordance with the quantity', however, she had foremost in her mind the consideration of public interest and the rampancy of the offence. (para 10)

(3) Pursuant to s. 316 (b)(ii) of the Criminal Procedure Code, this court reduced the sentence of a fine of RM10,000 in default of six months imprisonment to RM5,000 in default three months imprisonment. (para 14)

[Order accordingly.]

Case(s) referred to:

Mogan Maruthamuthu v. PP [2003] 5 CLJ 118 HC ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
Ooi Joo Keong [1997] 2 SLR 68 ***(refd)***
PP v. Jamaluddin Mokhtar [2006] 6 CLJ 288 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mohamed Nor & Ors [1985] 2 MLJ 200 ***(refd)***
PP v. Tia Ah Leng [2000] 5 CLJ 614 HC ***(refd)***
Soosainathan v. PP [2001] 6 CLJ 44 HC ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:

Corrosive & Explosives Substances & Offensives Weapon Ordinance 1958, s. 6(1)
Criminal Procedure Code, s. 316(b)(ii)
Dangerous Drugs Act 1952, ss. 12(2), 39A(1)(x), (2), 39B(1)(a)

For the appellant - Francis Teron Kadap; M/s Thomas, Shankar Ram & Co
For the respondent - Musli Abdul Hamid DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

[1] The appellant (accused in the court below) has in his notice of appeal appealed against conviction and sentence imposed by the learned Magistrate. However, on 20 June 2006 at the hearing of the appeal, Mr. Francis Teron Kadap, learned counsel for the appellant, informed the court that they have instructions to appeal against sentence only.

The learned Magistrate had sentenced the appellant to a fine of RM10,000 in default six (6) months imprisonment on his own plea of guilt. There was a stay of execution pending appeal granted by the learned Magistrate on 26 October 2004.

[2] The charge against the appellant is as follows:

> That you, on the 29th of June, 2004 at about 11 am at Parking Lot in front of Sara Home Improvement Centre, Tabuan Laru, Kuching, in the state of Sarawak, did have in your possession dangerous drugs to wit 0.31 gram of 3,4 Methylenedioxymethamphetamine (MDMA) which is listed in the First Schedule of the Dangerous Drugs Act 1952 without any authorization and you thereby committed an offence punishable under s. 12(2) of the DDA and punishable under s. 12(3) thereof.

[3] The brief facts of the case, exh. Annexure A, was admitted by the appellant which showed that one tablet, exh. P1 was found in his wallet and the appellant admitted that the tablet was given to him by a friend two days before his arrest. Exh. P2, the Chemist Report confirmed that the tablet cm analysis contained 0.31 grammes of 3,4-20 Methylenedioxymethamphetamine (MDMA) which is listed as a dangerous drug in the First Schedule of the Dangerous Drugs Act 1952 ("the DDA").

[4] The appellant has appealed against the sentence primarily on the grounds that the learned Magistrate:

(a) erred in law and in principle in passing the sentence and wrongly took into account the appellant's previous conviction in the year 1992 and that the same is irrelevant and a distinct offence;

(b) misdirected herself when she failed to take into consideration the weight of MDMA found in the possession of the appellant was a mere 0.31 grammes; and

(c) in the circumstances of the case, the sentence is manifestly and grossly excessive.

[5] The court is mindful of the principles to be heeded by the court when exercising its appellate jurisdiction concerning sentence as has been elucidated by Abdul Hamid CJ (as he then was) (delivering judgment on behalf of the Supreme Court) in *PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200 at p. 202 as follows:

> ... it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

[6] Applying the ratio of the aforesaid case and in the light of the submission of the learned counsel for the appellant (encl. 12) and the oral submission of the learned DPP Musli bin Abdul Hamid and the learned Magistrate's grounds of judgment pp. 7-11 of the Record of Appeal (ROA) and the other relevant matters in the ROA, I come to the following findings.

It has been submitted by Mr. Francis that the learned Magistrate erred in law when she viewed with seriousness the appellant's previous conviction and without basis took it as an aggravating factor thus failing to find that the gap of over 12 years between his previous conviction and the present unrelated offence has mitigatory effect. In this regard learned counsel referred to the grounds of judgment at p. 5 lines 12-15 and p. 11 lines 13-18 of the ROA.

[7] The learned DPP responded that the previous conviction of the appellant has nothing to do with the present conviction and submitted that the learned Magistrate has sufficient discretionary power to impose the sentence even without looking into the previous conviction of the appellant.

[8] In regard to this ground of appeal, I am of the view that the cases cited by Mr. Francis namely, *Soosainathan v. PP* [2001] 6 CLJ 44, *Zaidon Shariff v. PP* [1996] 4 CLJ 441 and *Mogan Maruthamuthu v. PP* [2003] 5 CLJ 118 are relevant. In *Zaidon Shariff*'s case *(supra)* His Lordship Augustine Paul J (as he then was) cited at p. 447 para h-i:

> In any event the fact that there has been a ten-year gap in the appellant's criminal record has not been duly appreciated by the learned Magistrate. The appellant's clean record since his last conviction in 1986 aught to have operated as a mitigating rather than as an aggravating factor. The rationale of the gap principle is that the offender has made an effort to rehabilitate himself and it should, accordingly, operate in his favour. In this regard, DA. Thomas in his book entitled *Principles of Sentencing* said, at p. 179:

A And *Soosainathan*'s case *(supra)* at p. 51 para e-g, His Lordship Augustine Paul J (as he then was) reiterated the "gap" principle:

> The longer the gap between a previous conviction and the current offence the greater the mitigatory effect (see *R v. Piercey* [1971] VR 647). In *R v. Boyd* [1975] VR 168 a 12-year gap free of "violent crime" was considered "equivalent to good behaviour". In my opinion the determinative factor in treating a person with previous convictions as a man of previous good character is not so much the time that has lapsed since the last conviction but the positive steps that he has taken to rehabilitate himself. This is in line with the underlying principle in the assessment of the appropriate sentence which is to strike a balance between public interest and the interest of the accused.

The same approach was followed by VT Singham JC (as he then was) in *Mogan Maruthamuthu*'s case *(supra)*.

At p. 5 lines 12-15 of the ROA, the learned Magistrate stated:

> Considering the seriousness of the offence as well as the growing rampancy and taking into account, previous record of conviction of the accused that contributes to his character and antecedent and also considering factors in mitigation. I hereby sentence you to fine of RM10,000.00 in default 6 month *(sic)* imprisonment.

[9] With due respect to the learned counsel for the appellant, I wish to point out that his submission that the learned Magistrate had "viewed with seriousness the appellant's previous conviction ..." is not quite in tandem with the passage which I have quoted above. What the learned Magistrate had in mind was the seriousness of the offence ("considering the seriousness of the offence") and, *inter alia*, the previous conviction of the appellant that contributed to his character and antecedent. Be that as it may, I agree with the learned counsel for the appellant that the learned Magistrate has erred in law in not giving due regard to the "gap" principle as there is a span of about 12 years from the previous conviction of the appellant which was committed in 1992 and for a completely different offence namely, possession of offensive weapon under s. 6(1) of Corrosive & Explosives Substances & Offensives Weapon Ordinance 1958 as per exh. P3.

[10] Secondly, the learned counsel for the appellant submitted that the learned Magistrate erred in law when she regarded that the quantity of drugs found in the appellant's possession has no relevance when passing sentence and in this context referred to p. 9 lines 29-35 of the ROA. The learned DPP submitted that

although the quantity of drugs may appear to be small, it is still to be considered dangerous drugs. As an analogy he referred to s. 37(da)(xxii) of the DDA ie, presumption of trafficking in respect of 50 grammes of MDMA which amount though appears to be not much may carry punishment of death if the accused is found guilty and convicted. Similarly, he referred to s. 39A(1)(x) where for an offence involving possession of 5 grammes or more but less than 30 grammes in weight of MDMA, the punishment provided is imprisonment for a term which shall not be less than two years but shall not exceed five years and also with whipping of not less than 3 strokes but not more than 9 strokes. The learned DPP further submitted that due to the serious consideration of the government to curb the rampancy of drug cases the offences under the DDA have been provided with different punishment when it involves different quantity of drugs forfeited from the offender. He also submitted that in this instant case which involves an offence under s. 12(2) of the DDA, the punishment provided by law include a maximum fine of RM100,000 which shows that it is the intention of legislature to curb the rampancy of offences involving drugs by providing a stricter sentence to preserve the public interest. *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 and *PP v. Tia Ah Leng* [2000] 5 MLJ 401 were cited in support. In the latter case at p. 401 the court held:

> (1) One of the main considerations in the assessment of sentences is the question of public interest. The seriousness of the drug menace must be reflected in the sentence depending on the circumstances of the case so that the requirements of public interest can be served effectively. *In cases involving drug offences, the quantity of drugs involved ought to affect the sentence to be passed since different penalties are prescribed in the Act dependent on the weight involved.* Thus the weight of the drugs is an indication of the gravity of the offence (see pp 4071, 408H-409A, E). (emphasis added).

I agree with both the aforesaid authorities. Further, I agree with the views expressed by the learned judge in *Zaidon Shariff*'s case *(supra)* and *Soosainathan*'s case *(supra)* that the weight of drugs found on a person plays a significant role in assessing sentence. Although I find the learned Magistrate has erred in stating that the seriousness of the offence committed by the appellant "cannot be measured simply by creating an equation between quantity of drugs and sentence to be pegged in accordance with the quantity", however, she had foremost in her mind the consideration of public interest and the rampancy of the offence.

[11] The learned DPP has provided the statistics from PDRM (encl. 17) showing the rampancy of drug cases for the year 2006 (January - March) and indeed it shows that in respect of the dangerous drugs MDMA more commonly known as ecstasy it shows a growing trend in respect of the commission of offences involving ecstasy (pills) since 1998.

[12] I agree with the learned counsel for the appellant that the case of *Ooi Joo Keong* [1997] 2 SLR 68 relied on by the learned Magistrate and the learned DPP has to be distinguished in the sense that the accused in that case has many previous convictions unlike this instant case, where the appellant has one previous conviction which can be discounted for the reason which I have alluded to earlier.

[13] The learned counsel for the appellant submitted that the learned Magistrate has failed to keep to the trend of sentencing involved and in support cited *Mohamed Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 and the cases of *Zaidon Shariff (supra)* and *Soosainathan (supra)* and has urged the court to substitute the sentence of the learned Magistrate with a fine of RM1,500 in default two months imprisonment. With due respect to the learned counsel, the mere citation of the two cases of *Zaidon Shariff (supra)* and *Soosainathan (supra)* is insufficient to show the trend adopted by the court; moreover in both the cases, the drugs involved are different being cannabis and Monoacetylmorphine respectively. What the learned counsel should have done was to prepare the tables to show the trend of sentencing of the Federal/Supreme Court, Court of Appeal and High Court in respect of MDMA as adopted by the court in *PP v. Jamaluddin Mokhtar* [2006] 6 CLJ 288 when tables were prepared in respect of cannabis. In this appeal the learned JC prepared the same whilst considering an appeal by the prosecution against the sentence of 11 years imprisonment and 10 strokes of whipping imposed by the learned JC when the accused pleaded guilty to the amended alternative charge of being in possession of 1,220 grammes under s. 6 of the DDA punishable under sub-section 39A(2) of the DDA after being originally charged with the offence of trafficking in dangerous drugs under s. 39B(1)(a) of the DDA.

[14] Having regard to the reasons adumbrated above pursuant to s. 316(b)(ii) of the Criminal Procedure Code, I reduce the sentence of a fine of RM10,000 in default 6 (six) months imprisonment to RM5,000 in default 3 (three) months imprisonment.